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Effective Crime Investigation and Prosecution - the link between witness and victim issues

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Abstract

The paper is concerned with the creation of an effective “evidence based” criminal justice process in South Africa and particularly with the role of the witness (i.e. the “prosecution” rather than the “defence” witness) therein. Declines in the effectiveness of the criminal justice process in South Africa have been reflected in falling conviction rates. Despite an increasing reliance on witnesses in order for cases to be solved and prosecuted effectively due recognition has not been given to witness issues in criminal justice policy. The paper therefore looks at the role and significance of witnesses in the process of crime investigation and prosecution. It seeks to identify issues which need to be addressed by criminal justice officials in working with witnesses, in order to ensure the effective “performance” of witnesses in the process of crime investigation and prosecution. While there has been a neglect of witness issues there has been an increasing interest in issues to do with victims of crime and in “victim support and empowerment”. But frequently the witness is also the victim and the paper therefore explores the relationship between “witness issues” which are issues to do with improving the “performance” of witnesses in the process of crime investigation and prosecution, and “victim issues” which relate to “victim support and empowerment”. In its conclusion the paper reflects on the implications of this discussion for the South African debate about “victims rights”.

1. Introduction

During the 1990s - the period of transition from apartheid to democracy in South Africa, the South African Criminal Justice system faced a problem of declining effectiveness. This was reflected most clearly in declining conviction rates. The most striking indicator of this would appear to be the overall decline in the rate of convictions which have fallen from 318 000 in the year 1993/94 to 261 000 in 1994/95 and to 218 000 in 1995/96. The 1996 figure therefore represents a 31% decline from that in 1994/95 and an even more drastic decline of 42% on the 1991/92 figure of 374 000 (Central Statistical Service).¹

This paper intends to contribute to the debate on how to reverse this decline in the effectiveness of the Criminal Justice Process.² What this paper is concerned with is the creation of an effective "evidence based" criminal justice process, and in particular, one crucial components of such an "evidence" based system, the witness.³ This motivation for this paper therefore is the belief that, if the effectiveness of the Criminal Justice System is to be improved, this can in part be achieved through improving the manner in which agents of the Criminal Justice System work with witnesses.

However there is another issue which is also of concern. From about the mid-1990s in South Africa there has also been an increasing interest in issues to do with victims of crime⁴ and with "victim support and empowerment". This work has manifested itself in initiatives such as the police victim empowerment programme and the establishment of special facilities for victims at police stations.

In so far as they have been concerned with the effectiveness of the Criminal Justice System, it would appear that the concern of victim advocates has primarily been a concern about how "victim sensitive" the criminal justice system has been in dealing with victims.⁵ Arguably those who are advocating on behalf of victims have not

¹ Figures for the period 1996-1998 suggest a further decline with the total number of convictions averaging slightly over 205 000 per annum in each of the latter three years (see Schonteich, 1999).

² This paper is focused on the Criminal justice process - primarily understood as the process of crime investigation and prosecution - and its effectiveness and can therefore be understood as focused on the police and prosecution service. The paper therefore focuses on these aspects of the criminal justice process rather than the entire Criminal Justice System which would also include magistrates/the judiciary, the correctional system, and presumably also systems intended to "divert" offenders from the Criminal Justice System.

³ In this paper the witness is assumed to be the ordinary "state" or "prosecution" witness. The paper does not therefore engage with issues which are particularly relevant to defence witnesses or, for instance, expert testimony either on behalf of the state or the defence.

⁴ A section of the victim movement in South Africa has also been concerned with issues relating to the victims of human rights abuses during the apartheid period in relation to issues such as the provision of counseling services and the question of reparations (see for instance Hamber and Mofokeng, 2000).

⁵ According to one document "victim empowerment is about making it possible for a victim to heal and move on from the crime with the least possible harm or loss. [It involves] entrenching internationally

concerned themselves with more general issues to do with the effectiveness of the criminal justice system and with weighing these concerns against each other. But being “victim sensitive” may place an additional burden on the shoulders of already overstretched criminal justice officials without necessarily making the criminal justice system more effective in terms of the task of apprehending perpetrators.

This paper is therefore concerned with understanding the role of witnesses in the criminal justice process. In particular it is concerned to identify the types of skills and understanding that criminal justice officials need to have in working with witnesses. It therefore seeks to identify “*witness issues*” which are *areas of skill or understanding around which there is potentially a need for criminal justice officials to improve and develop their skills if they are to improve their work with witnesses and therefore improve the “performance” of witnesses in contributing to effective crime investigation and prosecution.*

But some witnesses are also victims and therefore some “*issues of victim support and empowerment*” (or “*victim issues*”) are potentially also “witness issues”. One of the areas which the paper therefore explores is what is the relationship between “witness issues” and “victim issues”. The paper does this primarily through a focus on the provision of information to witnesses and victims.

The paper is therefore concerned with improving criminal justice system work with witnesses thereby improving the “performance” of witnesses in the criminal justice process. One issue which the paper engages with is how concerns which victim advocates have identified as primarily relevant to victims should be seen in relation to this concern. Before doing this however the paper briefly examines three related issues:

- Firstly it examines the motivation for a concern with the effectiveness of the Criminal Justice Process;
- Secondly it examines the idea of an “evidence based” Criminal Justice Process;
- Thirdly the paper examines the idea that work with witnesses is crucial to the effectiveness of the Criminal Justice Process.

In its conclusion the paper then reflects on the implications of this discussion for the South African debate about victims rights.

accepted basic victims' rights as agreed by the United Nations. These rights include the right: 1. To be treated with respect and dignity. 2. To offer information. 3. To receive information. 4. To legal advice. 5. To protection. 6. In certain circumstances victims also have the right to compensation.” (Business Against Crime and the Department of Welfare, p. 2)

2. The Criminal Justice Process

The importance of an effective Criminal Justice Process

An optimally effective criminal justice process is a precondition for the stability of society. In a context where the criminal justice process is believed to be ineffective a variety of undesirable consequences are likely to follow including a proliferation of criminality and vigilantism, a deepening sense of futility amongst those attempting to live respectable and law abiding lives, and the disruption and ineffectiveness of other institutions of the state and civil society.

The criminal justice process therefore exists primarily as a mechanism for society to attempt to deal with offenders in a manner consistent with standards of justice. In seeking to ensure that it serves this purpose most effectively we must acknowledge that meeting this objective itself holds innumerable risks (including risks against innocent persons) and extraordinary costs (the budgetary costs of maintaining and reproducing an effective criminal justice system).

The criminal justice process by itself does not represent a solution to the problem of crime. But this is not the primary purpose of the criminal justice process. The primary purpose of the criminal justice process is to deal with offenders - those responsible for crime and disorder. The criminal justice process therefore exists to step into the gap where societies other mechanisms of control and regulation have failed.

But even where cases are reported not all offenders are apprehended, and even where apprehended are not necessarily convicted. Furthermore, it appears that particularly where offenders are imprisoned, effectively the primary way of dealing with serious offenders who have been convicted, this often leads to a reinforcement of their involvement in crime once released. More generally the causes of crime - the reasons why people commit crime - are in many ways unaffected by the Criminal Justice Process. These factors are likely to continue contributing to the existence of crime even if the criminal justice process is functioning at an optimum level.

Essentially therefore the criminal justice process represents a "reaction" to the problem of crime and a reaction which in some ways, particularly through "promoting" imprisonment, contributes to aggravating the crime problem. The basic solutions to crime, (in the sense that crime levels may be reduced but crime cannot be eliminated) therefore essentially lie in the effectiveness of other structures, institutions or systems within society including the family, the school, government, the economy and a range of other institutions, most notably those which contribute to building the capacity of people to live meaningful lives within a framework of values which support healthy and respectful relationships between people in society.

Nevertheless the effectiveness of the criminal justice process is of fundamental importance, particularly in a society affected by high levels of crime such as is the case in South Africa. To paraphrase Reiner's discussion of the police,

“However it should not be concluded from this that the [criminal justice process is] not an effective and important part of the process of order-maintenance. The [criminal justice process is] an integral aspect of the presentation of society as governed by the rule of law. [It signifies] that there exists an agency charged with the mandate of apprehending offenders, so that there is always some prospect (however small statistically) of penal sanctions - a deterrent function. Moreover the [criminal justice process is] supposedly bound by fair, legalistic constraints of due process - [it represents] deterrence as justice not brute force.”

The existence of the criminal justice process therefore provides society with the capacity, at least where an offender is identifiable, to ensure that “justice” is done. Effectively the criminal justice process therefore removes from the victim the need or sense of obligation to “set things right” with the victim him or herself. The criminal justice process therefore provides society with an instrument for making perpetrators in some ways suffer the consequences of their criminal actions, and be held responsible for them, within a framework of lawfulness rather than one of lawlessness.

One of the important questions which this raises is on whose behalf the criminal justice process is operationalised. The answer to this question would appear to be that this is partly on behalf of the victim but that society generally has interest in bringing the perpetrator to justice. Thus through submitting the offender to the justice system the criminal justice process provides satisfaction not only to the victim but to (law abiding) society generally. In this way it contributes to the maintenance of a framework of order and values in terms of which legitimate conduct is distinguished from illegitimate, and that which is illegitimate, to the extent of being outside of the law, is sanctioned.

But the Criminal Justice Process’s function is not only the symbolic one of reinforcing and guiding the values of society. The criminal justice process also potentially serves a highly practical function in protecting members of society from those who are disposed to criminality, particularly those who represent a serious danger to society (if they can be apprehended and convicted). Furthermore, even where they are not apprehended, the existence of the criminal justice process creates the possibility of sanction against perpetrators which makes it necessary that they commit their acts by stealth in order to conceal their identity, and where their identity is known, are faced with the need of continuously having to evade apprehension.

Whether the criminal justice process effectively plays this role or not will always be a matter of degree.⁶ If the criminal justice process is functioning effectively then more

⁶ It should be emphasised that it is rare, even in the countries of the “developed world” that there is a conviction rate of over, for instance, 50% in relation to most crime categories. According to Bayley “Because most crime suspects cannot be identified readily, most crimes go unsolved. Japan is the exception among developed democratic countries. It’s police solve about 58% of all crimes reported to them. The United States has one of the worst records: only 21.6% of even the most serious crimes are solved; in Britain the number is 35%, in Canada, 45% and in Australia 30%. The likelihood of solving a crime varies with the nature of the offense, with higher rates for confrontational crimes and lower rates for property crimes. In the United States, for example, police solve 45.6% of violent crimes against people

perpetrators, particularly of serious crime, will be apprehended and convicted and there will be a greater awareness in society that offending carries with it the risk of sanction. Where the criminal justice process is ineffective, proportionately fewer will be apprehended and this is likely to be associated with a perception that the risk of apprehension and sanction is not particularly substantial. While not all perpetrators will be apprehended and sanctioned if the criminal justice process is functioning effectively it nevertheless appears self-evident that it should be a priority of public policy that the criminal justice process function at an optimum level of effectiveness.

Victims and witnesses and an effective criminal justice process

While the criminal justice process in some ways produces crime and therefore produces victimisation, where it is functioning effectively the overall impact of the criminal justice process should be to reduce crime and therefore prevent victimisation. However once crime has taken place the criminal justice process does not necessarily serve the interests of victims.⁷ The relationship between the interests of victims and the effectiveness of the criminal justice process is therefore in some ways complex. Victims are not necessarily always primarily concerned that the offender be sanctioned. They may be more concerned to be protected from further victimisation, that their property be returned or that some restoration or even acknowledgement be made for the loss or injury suffered. These qualifications notwithstanding, a key concern of the victim is frequently that the perpetrator be brought to justice, with this applying particularly in cases of a more serious nature. Many victims therefore have a direct interest in the effectiveness of the criminal justice process in attempting to ensure that the offender be brought to justice.

On the other hand the criminal justice process and its effectiveness is significantly dependent on the victim. The victim is generally the first person to inform the criminal justice system about the crime. Witnesses who are able to assist the police in solving a case are "usually the victim" (Reiner, 1992, p. 150). Evidence provided by the victim is often essential to the process of apprehending and convicting the offender. Particularly in cases of violent crime (with the obvious exception of murder) and notably in cases of sexual assault it might generally be assumed that the main witness or witnesses for the prosecution will often be the victim or (some of the) victims.

It must however be emphasised that it is in his or her capacity as a witness that the criminal justice process is most dependent on the victim. At the same time it is not only victims that the criminal justice process, in this sense, depends on. While many witnesses, particularly in cases of violent crime, are victims, many are not.

and 18.1% of property crimes. Among serious (or index) crimes, homicide is most likely to be solved - 67.2% - and motor-vehicle theft the least likely - 14.6%." (1994, p.27).

⁷ As noted above the main purpose of the Criminal justice process is that of dealing with perpetrators. The paper also noted that the Criminal justice process is in some ways operationalised on behalf of (law abiding) society generally as well as the victim and not exclusively on behalf of the victim.

Involvement in the criminal justice process by the witness or victim however exposes them to other risks including both risks of (further) victimisation by the perpetrator or his/her associates and the risk of “secondary victimisation” at the hands of criminal justice officials or other parties such as the defence attorney. The benefits of the witness or victim’s efforts to assist the Criminal Justice System may therefore increase the risks which he/she is exposed to and in some ways be minimised or nullified in that the victim is further victimised by the perpetrator or his/her associates or further traumatised by criminal justice officials. In an earlier report (Bruce, Newham, Reddy, 1999) we therefore suggested the following as an integrated statement of the effectiveness of the criminal justice process - here defined as the process of crime investigation and prosecution:

“The effectiveness of the criminal justice process is measured in terms of its ability - in a manner which is efficient, conforms to the standards of human rights defined in the Constitution, and is non discriminatory - to apprehend guilty people, make appropriate decisions about how to proceed against them, and effectively operationalise these processes⁸ for dealing with the guilty person, while not doing so to people who are not guilty of criminal offences *and whilst seeking to prevent the further traumatising and victimisation of victims, witnesses and other parties to the criminal justice process*”⁹.

This is intended as a modest statement which can serve as a guide to attempts at evaluating whether or not the criminal justice process is functioning effectively and how effectively it is functioning. While however it is intended as a modest statement any examination of its implications is likely to lead one to the conclusion that it is not an easy standard of effectiveness for our, or any criminal justice system, to fulfill.

3. From a “confession-based” to an evidence- based system

“Confessions” in pre-transition criminal justice

Prior to the transition to democracy in South Africa, agents of the Criminal Justice System were in many cases able to obtain convictions with relative ease through “confessions” from the suspect.¹⁰ While, in terms of the “judges rules” (see Joubert and

⁸ The concern with making appropriate decisions about “how to proceed” and effectively operationalising these “processes” refers specifically to the need to consider whether the preferable options lie in the field of “prosecution” or “diversion” or some combination of the two.

⁹ The issue of “further victimisation” here primarily refers to attempts by the accused person or his/her associates to use violence or the threat of violence or other means to discourage or prevent the witness (who is often the victim) from reporting the case or giving evidence/against him or her or to punish the witness for doing so - a phenomenon generally referred to as “witness intimidation”. However it also points to the issue of “repeat victimisation” (in relation to the latter see footnote 16 and 17 as well as Bruce, Newham and Reddy, 1999, p. 55).

¹⁰ Torture and the threat thereof was (and is) not necessarily restricted to suspects and has sometimes

Persad, 1998) members of the police service were intended to be bound by certain rules of procedure there is little evidence that these provisions had any real impact as judges and magistrates tended to be fairly lenient in admitting such “confessions”. Where the admissibility of “confessions” was contested in court, it appears to have been rare for their admissibility to be rejected by the presiding magistrate or judge. In Fernandez’s study for instance, while 82% of alleged assault and torture victims had legal representation at the trial, and in 26% expert evidence was lead to substantiate the allegations of torture, in only 11,6% of the cases were the allegations of torture, and thus potentially the allegation that a “confession” had not been freely and voluntarily given, proven to the satisfaction of the court” (p. 36).

As Gready and Kgalema (2000) show, if magistrates proved to be “obstructive” and failed to give their stamp of approval to particular confessions they could be bypassed by the police. Other more compliant magistrates could be found to give their approval to the confession. Furthermore, even if the suspect alleged that he or she had been tortured, and that his/her confession had not been freely and voluntarily given, he or she, remained at the mercy of the police. According to Fernandez

“When the police have secured a signed confession and present the accused to a magistrate to assess whether the confession was made freely and voluntarily the procedure involved is highly prejudicial to the suspect: he or she is returned to the custody of the police who have sight of the confession once the magistrate has assessed [it]. Should the police be dissatisfied with the confession the suspect is once more at their mercy and a new confession can be presented to the magistrate at a later date”. (1991, p. 22)

Mechanisms which were supposedly intended to prevent the extraction of confessions were therefore largely ineffectual. It must be emphasised that more general methods of crime investigation were used. However the “climate” was one where suspects and others were easily intimidated by the police with the consequence that the police and courts were, to a significant degree able to rely on the suspect to “solve” and “prosecute” cases. As one of Altbeker’s interviewees conceded, even while disputing that confessions were beaten out of suspects, “black suspects in particular would frequently be intimidated by the reputation of the police in general and the attitude of the investigating officers in particular”.(p. 61 (note 8)). It would only have been where other evidence was not readily available and suspects failed to “cooperate”, that the police would need to extract “confessions” through assault or more systematic torture.

The transition to an “evidence based” system

Subsequent to the adoption of the “interim” Constitution (Act 200 of 1993) the police and courts have however been compelled to operate subject to the Bill of Rights. This does

been known to be used to obtain the cooperation of, for instance, witnesses or family members or other friends or associates of the suspect.

not mean that confessions cannot be admitted but far higher and more rigorous standards have to be applied in demonstrating that such confessions have been given voluntarily.

Most importantly, in *S v Zuma and others* (CCT/5/94; 1995(2)SA 642(CC); 1995 (4) BCLR 401 (SA). See Mosikatsana, 1996) the court rejected the constitutionality of the then s 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977 which placed on the accused the reverse onus of proving that confessions which had been recorded by a magistrate were not free and voluntary. The court held that s 217(1)(b)(ii) was in conflict with the accused's right to be presumed innocent and to remain silent at trial, provided for in ss 25(2) and (3)(c) and (d) of the Constitution.

Thus, when an accused who has made a confession to a magistrate (prior to the trial), denies during the trial that the confession was freely and voluntarily made, the state now carries the burden of proving that the confession was freely made, or the confession becomes inadmissible. According to Albeker, what this now means is that, "when an accused wishes to confess, investigating officers try to see to it that the *confession is made* before a magistrate in order to protect the integrity of the statement in a later trial" (1998, p. 60 (note 7)).

Effectively therefore in talking about the transition to a evidence based system this paper is not saying that confessions are not used any longer in the criminal justice process in South Africa. According to Albeker "confessions do remain a fairly important source of evidence in criminal trials in South Africa" (1998, p. 49). In practise however the state (represented by the prosecution) is compelled to rely on evidence other than a confession in a much greater proportion of cases in court. This change to a greater reliance on an evidence based (as opposed to confession based) system has not only impacted in the courts but also has the implication that the police in their investigative work, to a much greater degree, have to focus on gathering evidence other than by relying on the suspect.¹¹

4. Witnesses and an effective evidence based criminal justice process

Effective crime investigation

According to Klockars and Mastrofski the possibility of the police being effective in the crime investigation process only exists if at least one of the following elements is present: (1) *a witness* - someone who can identify the perpetrator; (2) *physical evidence* - trace elements of an act that can link a suspect to the offence; or (3) *a confession* - an admission by the perpetrator" (1991, p. 135). If the police lawfully can obtain any of the

¹¹ It should be emphasised that the need for criminal justice officials to rely on evidence based methods as opposed to confessions is not presented here as the reason for the decline in the effectiveness of the criminal justice system. The explanation for this decline would have to be located in a number of factors associated with transition of which the need for evidence based criminal justice is possibly one.

above three types of evidence this therefore may mean that there is the prospect of the case being solved. But one of the above three elements does not necessarily exist in all cases.¹²

In practise therefore, in dealing with cases which come to their attention, it is most worthwhile for the police to focus on cases where one of the above elements is present. Furthermore, particularly in serious cases, it may prove to be worthwhile to put additional effort particularly into ascertaining whether or not a witness or useful physical evidence, can be found where initially it appears that this is not the case. But this cannot be done in every case. As one British Scene of the Crime Officer comments, in looking for physical evidence, the type of search,

“depends entirely on the scene.... Most burglaries it’s only fingerprints, but if we do have a suspect then the [officer in charge] will ask for other forensic. There is not enough time to collect forensic in every case”. (quoted in Tilley and Ford, 1996, p. 18)

According to Bayley what the vast majority of detectives who investigate crime basically do is “talk to people - victims, suspects, witnesses - in order to find out exactly what happened in particular situations and whether there is enough evidence to arrest and prosecute suspects with a reasonable likelihood of conviction” (1994, p. 26). Contrary to certain stereotypes which depict successful crime investigation as being dependent either on the 6th sense of a Sherlock Holmes type detective, or on forensic evidence, the vast majority of cases which are solved by the police are solved because of the assistance of another person, a witness, who is likely to be but may not be the victim.

Relatively few cases are in fact solved using physical evidence alone. “Physical evidence is used as confirmation - to support testimony that identifies suspects. It is seldom used diagnostically, to find suspects... It hardly ever leads to the identification of persons not already suspected by the police” (pp. 26-27). “Contrary to their fictional portrayal, detectives quickly formulate a theory about who committed the crime and then set about collecting the evidence that will support arrest and prosecution” (p. 26). “In short, criminal investigators begin with an identification, then collect evidence; they rarely collect evidence and then make an identification” (p.27).

According to one study of the uses of forensic evidence in Britain, for instance, forensic reports were primarily used in cases where there were already suspects whether the latter had been charged or not. Where there was a suspect, forensic evidence was mostly used as part of the prosecution evidence. In some cases it also served as the means of clearing a suspect of responsibility for a particular crime. Where there was no suspect the primary value of forensic evidence had been in “helping to define the nature

¹² Thus, for instance the statement in the police College for Advanced Training handbook on "Principles of Crime Investigation" that "clues in some form must be left at every scene of crime, through which the true facts can be exposed" (SAP, 1994, p. 7) may create the misleading expectation that every crime is in fact solvable.

of the case... Over a third of the cases without a suspect were those where arson was surmised, where the [Forensic Science Service] helped to determine whether there was an offence to investigate" (Ramsay, 1987, quoted in Tilley and Ford, 1996, p. 11).

The crime investigation process therefore has certain limitations. While in theory all cases may appear to be "solvable" in practice only a limited proportion of crimes can in fact be "solved". Furthermore certain types of fairly routine investigative steps (including particularly the identification and debriefing of witnesses) contribute to a particularly high proportion of cases which are "solved". According to a US Study of detectives, in roughly 70 percent of cleared ["solved"] crimes

"the perpetrator is known when the crime report is first taken" or the cases "were also solved by patrol officers, or by members of the public who spontaneously provided further information, or by routine investigative practices that could also have been followed by clerical personnel.... No more than 2.7 percent of all [serious] crime clearance can be attributed to special techniques used by [detectives]" (Chaiken, et al, 1977, p 172).

In terms of crime investigation, rather than focusing on specialist investigative techniques, a focus on improving these more "routine" aspects of police investigative work may have the greatest potential to improve the clearance rate of the SAPS and, more importantly, to improve the quality of cases which are presented by the SAPS to the courts. Most significant however would appear to be the fact that it is usually witness evidence (often in fact from the victim) that enables the police to solve crimes.

"It is only relatively recently that studies of the detective function have been conducted which imply that even crimes which are cleared up are not usually detected as a result of investigative effort. ... The major findings of studies of the process by which crimes are cleared up is that the prime determinant of success is information immediately provided by members of the public (usually the victim) to patrol officers or detectives when they arrive at the scene of the crime. If adequate information is provided to pin-point the culprit fairly accurately the crime will be resolved, if not it is almost certain not to be. The proportion of crimes cleared up almost immediately (as a result of the offender still being at the scene when the police arrived, or being named or very precisely identified by victim or witnesses) was as high as 57% in Steer's study and 62% in Mawby's" (1992, pp. 150-152).

Meeting the needs of witnesses

Arguably therefore part of the solution to the problem of declining criminal justice effectiveness lies in improving "routine" police practise in working with witnesses. Both victim and non-victim witnesses, particularly witnesses who have evidence which can assist in positively identifying the perpetrator, are potentially the single most crucial

asset in the process of crime investigation and prosecution. But even where a witness can assist the police in solving the case, this fact will not necessarily contribute to the offender eventually being convicted unless the witness's potential to assist the criminal justice process is properly realised. There would appear to essentially be two types of obstacles in this regard:

- **The police may fail to solve the case due to a lack of skill in working with witnesses** - particularly in the early stages of the criminal justice process the danger is that the police may actually fail to identify the witness or, because the witness fears the type of handling which she or he will receive from the police, effectively discourage the witness from reporting the crime or making him or herself available to the police. Furthermore the police may undermine what potentially may be good quality evidence through their lack of sophistication in, for instance, interviewing the witness, or taking statements, or for instance due to communication problems potentially arising from language differences. The witness may also be afraid of the consequences of co-operating with the police and therefore fail to make him or herself available to the police.
- **Even if the case is solved, a neglect of witness issues may lead to the prosecution (or other procedure) failing** - even if the police, perhaps notwithstanding some of the above problems, have solved the case, and submitted a docket, which contains the elements of a prosecutable case, to the prosecution, the case may be lost due to the manner in which the witness is subsequently managed. *Inter alia* this may be because the witness is poorly prepared to give evidence, or no longer has a clear memory of the incident possibly because an extensive time period has elapsed since the case. It may also be because the prosecutor is poorly prepared to lead the witness evidence, or because the witness fails to come to court. Non-attendance by the witness may be either because she or he has difficulty getting to court (potentially due to lack of transport), or because she or he has, for instance, forgotten the court date, or even not been properly notified about it. Non attendance may also be related to the fact that the witness has been discouraged from attending court, either because of delays in the court process and for instance frustration with time wasted in court, or because of intimidation by the accused or his or her associates.

Once a case is "solved" in that a perpetrator is identified and some type of provable case seems to exist against him or her, the prosecution, as agents of the Criminal Justice System in the courts, begins to take a far more prominent role in the criminal justice process. In engaging with these obstacles to the effectiveness of the criminal justice process what may therefore partly need to be addressed is how the cooperation of the police and prosecutors in relation to witness and victim support and management can be improved. A concern with witnesses and victims should therefore extend to the courts and the possibility of incorporating a greater responsiveness to their needs into court management and process.

Witnesses in policy

However while witnesses have been the focus of some initiatives in the courts and for instance some police training programmes¹³ there has been hardly any attention given to witnesses on the policy level other than in relation to the issue of witness protection.¹⁴ While some attention is given to the issue of witnesses in for instance the White Paper on Safety and Security and the Department of Justice's Justice Vision 2000 document there has effectively been no substantial engagement with issues concerning witnesses in policy formulation. This would appear to reflect a failure to acknowledge the important sense in which the creation of an effective evidence based criminal justice system depends substantially on optimising the role of witnesses.

While there has been little interest, on a policy level, in issues relating to witnesses there has been substantial interest in the status of victims. Thus for instance the 1998 White Paper on Safety and Security states that:

“Improved victim support and empowerment can assist investigations and serve as a means of altering public perception of police effectiveness. Thus, the link between victim support and successful investigations is critical to improving service delivery and therefore to enhancing public confidence in the police.”
(Department for Safety and Security, 1998; p.14).

In fact the White Paper itself does directly acknowledge that it is not only “victims” but also witnesses who “play an important role in assisting the police in the collection of evidence and through participating in the process of prosecution” (op cit).

The document goes on to list eight points intended to detail “good practise for serving and protecting victims”. While some of the points refer exclusively to victims, included are also the following:

- The questioning of victims and other witnesses .. should be carried out with respect for the dignity of the individual;
- Where required, priority should be given to the protection of victims and witnesses during investigations;
- Appropriate conditions constraining defendants or offenders from contacting a victim or witness should be included in the provisions of bail, non-custodial sentences and parole. Victims should always be informed of the details of these conditions and should have clear information on the action to be taken if they are breached.

¹³ It should be noted that some victim empowerment programmes “acknowledge” witnesses though is often through the circumlocution of “classifying” them as “victims”.

¹⁴ With regard to the Witness Protection Programme see, for instance, “Testifying Without Fear: A report on Witness Management and the National Witness Protection Programme in South Africa”. Written by Injobo Ne Blandla for the Centre for the Study of Violence and Reconciliation. October 2000.

- Where relevant, procedures should be developed to ensure that offenders are not able to identify witnesses (pp. 14 -15).¹⁵

In the White Paper therefore, if not in many other documents, a concern with witnesses and not just victims is recorded. However in a sense a concern with witnesses is “tacked on” to victim support. Thus, in the passages quoted above, the policy firstly refers to the need for “improved victim support” saying nothing explicitly about support for witnesses and then refers to “conditions constraining defendants or offenders from contacting a victim or witness” but then only says that “victims should always be informed of the details of these conditions”. By dealing with witnesses under the victim banner the White Paper therefore effectively misses the point about witness issues. The White Paper deals with witness issues as a form of victim empowerment rather than it terms which strongly emphasise that working effectively with witnesses is fundamental to effective crime investigation and prosecution.

In the words of Reiner, quoted above, the witness is “usually the victim”. Particularly in cases of violent crime, (with the obvious exception of murder) it might generally be assumed that the main witness or witnesses will often be the victim or (some of the) victims. But focusing on the victim and the victim’s needs may lead to a neglect of the witness concerns or needs for two reasons. Firstly there is the simple fact that many witnesses are not victims. The needs of non-victim witnesses may tend to be ignored in terms of a perspective which prioritises “the victim” as the person most deserving of attention and support. Secondly the types of issues which are prioritised as a result of the focus on the victim may tend to be those which are associated with the needs, and vulnerabilities, of the person who has been victimised. These may be different from the type of factors which impede criminal justice officials in optimising the role of witnesses in the Criminal Justice Process.

5. The relationship between witness and victim issues in the criminal justice process

Supporting witness participation

What then are the factors that impact on witness participation in the Criminal Justice Process? In a study completed last year (Bruce, Newham and Reddy) we attempted to identify the range of issues of skill and good practise which are relevant to working with witnesses taking into account the fact that the witness is often the victim.

¹⁵ On the other hand the proposal regarding “consistent report backs on the progress of all investigations and prosecutions” refers to victims only and not to witnesses. The other points refer to the need for specific guidelines relating to the treatment of victims of sexual offences, rape and domestic violence, the need for specific guidelines for treatment of juvenile and child victims, and propose that the police at local level should be involved in networks with organisations which provide assistance to victims.

Table 1 lists 19 separate issues which may be understood as relevant to witnesses, particularly in relation to ensuring their effective participation in the criminal justice process. The factors outlined may lead either to a failure to solve the case or to a failed prosecution. Some factors may be highly relevant in some cases but not in others.

The middle column of Table 1 also then classifies the issues in relation to whether they are primarily relevant to the work of the police (including either uniformed members of the service or detectives) or to the work of the prosecution or other parties. In relation to many of the issues it would appear that dealing with the issue effectively may depend on proper cooperation and communication between the police and prosecution service.

It must be emphasised that it is difficult to categorise these issues partly because there are large areas of overlap between many of the issues identified. Thus to take only a couple of examples:

- Factors contributing to non-reporting of crime or to a witness being reluctant to come forward may include many of the other factors listed including a concern about how they will be dealt with in the charge office, a concern that they will be inadequately protected or a belief that they will end up having to waste an unjustified amount of time at court. They may also include other factors such as a sense that reporting crime is futile because of the ineffectiveness of the criminal justice system;
- Language and literacy issues are directly relevant to statement taking, to communication with the witness more generally, and to briefing of the witness for court as well as to many of the other issues outlined.

However the issues identified have been distinguished from each other in the belief that this will facilitate a fuller understanding of the range of potential factors which may impact on witnesses. Some of the classifications may be controversial partly in relation to whether the issues are identified as relevant to the police or prosecution. It was not however our concern to have the final word on how these issues should be classified but above all to attempt to understand what the range of issues are which are relevant to work with witnesses and victims.

In relation to each of the issues identified in Table 1 it might be asked whether they are appropriately considered to be “victim” or “witness” issues or whether, for instance the issue should be understood somewhat differently in dealing with witnesses who are victims as opposed to witnesses who are not victims. Furthermore one might ask to what extent this issue or concern is being dealt with effectively within the criminal justice process at present? What are the consequences for victims, the criminal justice process, or society generally if these issues are not engaged with. And what may be the financial costs or other implications of attempting to ensure that these issues are engaged with effectively.

Table 1: Issues impacting on the contribution of witnesses to the effectiveness of the criminal justice process

Issues	Responsibility of police (detective or uniformed) or prosecution or other party.	Potential relevance to victim who is not a witness?
Factors contributing to non-reporting of crime and reluctance to come forward as a witness	Both police and prosecution.	Yes
Conduct of police in charge office and at crime scene	Police (mainly uniformed).	Yes
Sensitivity to effects of trauma on victims and witnesses	Both though referral is mainly police responsibility	Yes
Diversity issues and racial or gender or other discrimination	Both	Yes
Statement taking	Police.	Yes (initial crime report)
Language and literacy issues	Both	Yes.
Issues of legality and good practise relating to collecting and leading evidence	Both	Not really.
Identifying and tracing persons and remaining informed of their whereabouts	Police.	Yes.
Witness protection	Both.	No.
Information issues and communication with the witness	Both	Yes
Consultation of the witness regarding decisions (bail, plea bargaining etc)	Prosecution.	Yes
Minimising delays in case coming to trial	Both	No
Ensuring attendance of witnesses at court	Both	No
Time spent (wasted) at court	Both	Yes
Vulnerable witnesses including victims of sexual offences, children, sick and disabled persons and the elderly.	Both	Yes
The court environment	Court administration	No.
Briefing/preparation of the witness	Mainly prosecution.	No.
Special courts and procedures	Prosecution.	No.
Compensation for expenses and or losses incurred as a result of cooperation with the criminal justice process (witness fees and other payments)	Both.	No.

The link to victim empowerment

How then should we understand the relationship between issues relevant to working effectively with witnesses and victim empowerment? Whether the witness is a victim or not it would appear that many issues which have often been understood as “victim” issues may be relevant to them though this will depend on the specifics of the case

Thus, for instance, witnesses who are not the direct victims may often be subject to traumatisation as a direct result of the initial incident and potentially therefore be able to benefit from trauma counselling. While in general it can be assumed that victims will be in greater need of such services, there may be cases where a witness who is not a victim is in greater need of such support, partly due to the fact that the degree of traumatisation depends not only on the nature of the original traumatic incident itself but on the capacity of the person for coping with such incidents.

The issue of secondary victimisation by criminal justice officials or other parties such as the defence attorney, as a result of which victims may suffer further traumatisation, has also been a key concern of the victim empowerment lobby. However the type of treatment which people receive, in the charge office for instance, is not only relevant to victims but may in fact be understood as relevant to witnesses as well and in fact to members of the public generally. However while arguably all are in need of respectful treatment, the needs of victims for specially sympathetic treatment may be slightly greater, particularly in cases of a more serious nature.

Thus issues of victim empowerment may be relevant to victims as well as to witnesses who are not the direct victim. The potential benefits of addressing these issues may therefore have a positive impact both for victims as well as for non-victim witnesses and as a result have positive spin-offs for the criminal justice process as a whole.¹⁶

Effectively therefore virtually all “victim issues” may be “witness issues” as well firstly because many victims are witnesses, but also because they may also be relevant to witnesses who are not direct victims. Thus “victim issues” are also “witness issues” is so far as they also relate to ensuring that the evidence of (victim and non-victim) witnesses is used, and that witnesses participate, effectively in the criminal justice process and that factors which may discourage such participation are minimised.

All of the issues identified in Table 1 are therefore relevant to witnesses, even though the way in which they are relevant to witnesses who are not victims may in general be different from their relevance to witnesses who are victims.

However some of the issues identified (or aspects thereof) may be understood primarily as “witness” issues but are not really relevant to victims who are not witnesses. Thus in

¹⁶ The one issue which may be seen as virtually exclusive to victims and which is not of general relevance to non-victim witnesses is that of preventing potential repeat victimisation (see also footnote 9 and 17). Nevertheless the issue overlaps in some cases, such as cases of domestic violence, with the problem of witness intimidation and in this sense overlaps with “witness” issues.

the right hand column of Table 1 a rough indication is given as to whether the issues identified are likely to be relevant to a person in the latter category.

These issues are illustrated in what follows in relation to questions of the provision of information to victims and witnesses.

Providing information to victims and witnesses

One issue which is sometimes put forward as a victim issue or a victim “right” relates to the provision of information sometimes referred to as information on “the progress of the case”. The motivations which are put forward for providing better information to victims often appear to make reference to elements of one or more of the following three arguments.¹⁷

- **A victims’ right to be provided with information.** The victim is the person who is likely to have reported the case, and in fact is the “source” from which the case derives in the sense that were it not for his/her victimisation there would be no case to investigate. In a sense therefore the case “belongs” to the victim more so than it does to the agencies of the criminal justice system and, while they are administering the investigation and prosecution of it, it would appear that the victim has a reasonable claim (potentially a “right”) to be kept up to date with developments relating to the case.
- **Improving the public image of the Criminal Justice System and contributing to respect for the law.** The provision of information, it is argued, along with other victim support or empowerment measures will lead to the victim developing a greater respect for the Criminal Justice system and the law more generally. An improvement in the public image of the Criminal Justice System, it is argued, will for instance encourage better reporting.
- **Providing information is functional to the effectiveness of the criminal justice process.** In some respects providing information to victims is necessary in order for them to cooperate properly with and assist the criminal justice

¹⁷ A fourth motivation for providing information to victim relates to the potential for such information to contribute to victim empowerment. This includes arguments that: Firstly certain forms of information may empower victims through assisting them to take responsibility for dealing with the consequences of their victimisation (information on counseling and support services available, information on claiming disability support and coping with the consequences of disability, or information on putting in insurance claims); Secondly certain forms of information may enable them to avoid further victimisation (for example crime prevention advice intended to assist them to avoid such - repeat - victimisation); Thirdly certain forms of information may enable them to understand what is happening with their cases and participate in the criminal justice process effectively (information about investigations, the bail system and court procedures). The first two examples reflect concerns relatively independent from those addressed here. In this latter sense the argument overlaps with the issues addressed here relating to the effectiveness of the criminal justice process, the credibility of the criminal justice system, and the victims “right” to information.

process at relevant points. To take some examples: information which the victim provides at the bail hearing indicating that he or she has reason to fear intimidation is directly relevant to the effective functioning of the criminal justice process. If the victim is not informed of the suspects arrest and the impending bail application, this information may never come to the prosecutors attention. Similarly if the victim is to provide evidence at the trial he or she obviously needs to be informed of when this will be. If he or she does not understand court procedure, it may be helpful to outline this to him or her.

In general though it would appear that the full practical implications of according to victims a right to information have not really been fully considered.¹⁸ The idea that victims have a right to be kept informed may seem to imply that it is a relatively straightforward business to “provide information”. But what of the practical implications? Is this information to be provided telephonically or by post? And to what lengths should criminal justice officials be expected to go in seeking to uphold this “right”?

Outside of the context of a struggling criminal justice system faced with limited resources and over extended personnel this argument is fair and reasonable. But if victims have a right to information how much information, how often, does this right entitle them to? What lengths should be gone to and what costs should be entered into in order to ensure that this right is upheld? And what if one of the costs is placing further demands on criminal justice officials who feel that they are already overextended?

A statement to the effect that victims have a right to be kept informed of “progress” in their cases in fact has considerable implications in terms of the time of officials of the criminal justice system and resources which will need to be allocated to sustain such a “right”. While the motivation for keeping victims informed is not unreasonable the statement is effectively one which implies that this “right” should take priority over allocating resources to other issues. Furthermore the statement that it is a right would appear to imply that it must be accorded to all victims equally and not just, for instance, in priority cases.

It would appear reasonable however, in the event that a decision is made not to proceed with the investigation into a particular case, or to close the investigation even after some investigative effort has been undertaken, that the victim should be informed of this fact. The implication is that at minimum the victim should be provided with information relating to how the police are dealing with the case. The argument is therefore not for “progress reports” but for basic information as to the basic disposal (investigation continuing, investigation closed - unsolved or case not investigated) of the case. Potentially this could be combined with an undertaking that should there be further key developments in the case - particularly the charging of a suspect - the victim

¹⁸ One exception to this would appear to be the Integrated Justice System project which falls under Business Against Crime. The IJS project has developed a design for an information technology system which would, inter alia, assist the police and other components of the criminal justice system in meeting information provision requirements. The projected cost of the system runs into billions of rands.

will be informed of these facts.

As Morgan and Sanders point out in the UK practise was:

“.. if the offender pleaded guilty from the outset there was no requirement to involve or inform victims and they were often told nothing. Victim Support campaigned for victims to have the right to this kind of information.” (Morgan and Sanders, 1999).

Developments such as the trial, acquittal or conviction of a suspect in relation to a case which a victim has reported, even where the evidence of the victim is not material to the case, should be seen as other key developments in relation to which it is reasonable that the victim be informed.

The motivation provided here is not specifically that victims have a “right” to this information but simply that considerations of basic fairness or reasonableness, and to some extent the credibility of the criminal justice system, motivate for this kind of information to be provided to victims.

However while we may believe that providing information about the “progress” of cases is fair to victims it does not necessarily follow that the provision of such information will contribute to the credibility of the criminal justice process. While the argument may have some merits it also assumes that information is necessarily positive or at the very least benign. But in practise as many as 50% of cases are declared untraced by the police, and even cases which are referred to court by the police are not necessarily prosecuted. As Morgan and Sanders say

“Experience suggests that expectations are raised that cannot always be satisfied. Telling a victim that their case will be dropped, for example, leads many victims onto the obvious question of “why?”. If this question is not answered, many victims end up less satisfied than they would have been if they had been kept in the dark.” (1999)

Improved provision of information will not necessarily be met by an increase in satisfaction on the part of victims and calls for a degree of skill and sophistication in dealing with potentially unhappy victims. Furthermore it is only if this is combined with a general improvement in effectiveness and thus in all round public credibility that there will be any chance of it improving the public image of the criminal justice system. Information provision should therefore only be seen as something which will contribute to the credibility of the Criminal Justice System if its provision complements, or at least is combined with, improvements in the effectiveness of the Criminal Justice System. If the expectation that information be provided simply places an additional strain on already over extended criminal justice officials it will be unlikely to contribute to either greater effectiveness or credibility.

While considerations of fairness motivate that the victim be provided with information regarding the disposal of cases which they have reported, considerations of the credibility of the Criminal Justice System do not necessarily have this implication.¹⁹ On the other hand the argument that information should be used to contribute to the effectiveness of the criminal justice process in proceeding against perpetrators is not exclusively relevant to victims but is in fact relevant generally to witnesses (and arguably irrelevant to victims who are not witnesses). In fact in some cases the key witness may not be the victim, and the victims assistance may not in fact be necessary for the case to be prosecuted effectively. This argument then is primarily an argument for providing information to witnesses including of course victims who are witnesses. There is presumably little need to provide information of this kind to the majority of victims who are unlikely to be involved in identity parades, bail hearings and other court procedure.

In terms of addressing issues of the effectiveness of the criminal justice process the key question becomes not that of victims' rights but rather what information do witnesses (whether they are victims or not) need in order to cooperate with and assist the criminal justice process most effectively in order to enable it to meet its objective of proceeding in an appropriate manner against suspects. The answer to this question will necessarily depend on what happens to the case concerned, whether it is "solved" and particularly whether a suspect is arrested and whether the case goes to trial. In this connection therefore it is primarily information relating to, for instance, identification parades, the arrest of a suspect, the bail hearing, or trial and court procedure related information which is potentially most relevant. Furthermore information which highlights the issue of intimidation, and steps which the witness should take in the event of some form of intimidation occurring, is also directly relevant here.

What is most relevant to the issues being discussed here is that some forms of information are primarily relevant to witnesses (including victims who are witnesses) and as such can more appropriately be understood as a witness rather than victim issue. Thus if we are talking about providing information relating to the conduct of court proceedings and to the appearances in court for instance then we are concerned primarily with witnesses and their effective participation in the criminal justice process. The issue here therefore also concerns victims who are witnesses but is not relevant to cases where the victim is not required to appear in court and is therefore effectively a "witness" rather than a victim issue.²⁰

¹⁹ It is of course also possible to use the same arguments (issues of fairness and the credibility of the criminal justice system) to argue that (non-victim) witnesses should also be provided with information about the "progress of cases".

²⁰ In relation to information as victim empowerment (see footnote 17) the type of information provided might be quite different. For instance, rather than an emphasis on the procedures of the criminal justice process it might deal more with the principles involved. Why is the suspect granted bail? How does the court decide whether to convict or acquit, etc.

6. Conclusion – the debate about victims’ rights.

While the use of witnesses is not something that is new to the Criminal Justice System what has changed in South Africa is the degree to which the system is reliant on such witnesses. Furthermore what has also changed is the basis for obtaining the cooperation and compliance of witnesses. In particular, unless reliance is to be placed exclusively on coercive mechanisms for obtaining such cooperation, what is necessary is that witnesses be positively motivated to cooperate with the criminal justice system.²¹

From the point of view of improving the effectiveness of the criminal justice process a key area of concern is therefore attention to the role of witnesses and to addressing their needs. This perspective suggests that there are a range of issues which criminal justice officials need to engage with if they are to work effectively with witnesses. While these issues include many “victim issues” the range of these issues is broader than those which are traditionally focused on by victim advocates.

As Morgan and Sanders argue referring specifically to the issue of the provision of information to victims, “There is a financial cost: people need to be employed to provide these services...”. (1999). In a developing country like South Africa, affected by a crisis of violence and criminality, it is therefore not simply good enough for us to make claims on behalf of victims or witnesses. In some ways what is necessary is that we identify priority concerns in relation to both of these groups, and target resources, and motivate officials and others to focus on meeting these priority concerns

While many of the issues raised in relation to victims represent valid concerns the question remains as to how these concerns should be viewed in relation to other concerns which relate to the effectiveness of the criminal justice process.

The debate about victims rights however specifically seeks to suggest that victims as a class of persons should be able to demand specific types of action, such as the provision of certain types of information, from criminal justice officials.²² While it appears that there is a moral basis for many of these claims the problem with classification of these “claims” as rights is that it removes the element of discretion from

²¹ Positive (particularly financial) incentives to cooperate are not an option as they may bring into question the integrity of the witness evidence. Ultimately one therefore needs to rely on the personal motivation of the witness to cooperate with the criminal justice system perhaps out of a sense of civic duty or desire to see justice done. The focus on “witness issues” is a focus on factors which may serve as impediments to witness cooperation with the understanding that these impediments, and thus the factors that discourage “civic duty” should, in so far as possible, be minimised. (On the issue of civic duty see for instance Domanski, 2000. Also see Van Vuuren, 2000, regarding the general rights and duties of citizens in relation to the law).

²² It cannot really be said that the idea of victims’s rights has been promoted with that much vigour in South Africa recently. The idea possibly had greater currency a year or more ago when, for instance, a team under the Department of Justice was involved in formulating a draft Victim’s Charter. The South African Law Commission Issue Paper on Sentencing Restorative Justice, for instance, proposes that “legislation should provide for a number of principles which should govern the treatment of victims” (at 4.6). The idea is also debated by Meintjies-van der Walt (1998).

criminal justice officials in prioritising cases, whether this is in terms of their seriousness, or in terms of those witnesses or victims who have the greatest needs.

Defining certain measures as “victims’ rights” will therefore lead to these measures being prioritised above others which, in terms of the case load of the specific detective, or prosecutor, are in fact more important. One of the unintended consequences of the creation of victims’ rights may be that non-essential measures are prioritised above essential ones.

Potentially therefore the new status of victims in criminal justice policy making may in fact contribute to the neglect of non-victim witnesses, who are also often subject to intimidation and victimisation, and divert the attention of criminal justice officials from measures which are most urgently needed if cases are to be effectively investigated and prosecuted.

The ideal situation within a context of limited resources is therefore that criminal justice officials correctly identify cases where special interventions are most needed, and prioritise these interventions, in an appropriate and non-discriminatory manner, accordingly. Ensuring that criminal justice officials engage with this task therefore requires more sophisticated forms of performance management within the criminal justice system, rather than a Bill of Victims’ Rights.²³

²³ See Meintjies -van der Walt (1998) on the residual victims’ rights inherent in the Constitution. Key provisions of the Bill of Rights which may be violated by acts of criminality may include:

Section 7(1) which provides that The Bill of Rights “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

Section 7(2) which states that “the State must respect, protect, promote and fulfil the rights in the Bill of Rights.”

Section 9(1) which provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”.

Section 10 which states that “everyone has inherent dignity and the right to have their dignity respected and protected”

Section 11 which states that “Everyone has the right to life”.

Section 12 (1) which states, inter alia, that Everyone has the right to freedom and security of the person which includes the right -

- (a) not to be deprived of freedom arbitrarily or without just cause;
- (c) to be free from all forms of violence from either public or private sources;
- (d) not to be tortured in any way; and
- (e) not to be treated or punished in a cruel, inhuman or degrading way;

Section 12(2)(b) which states, inter alia, that “everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body”.

Section 14 which provides, inter alia, that “everyone has the right to privacy, which includes the right not to have –

This is not to say that there is not scope for specific issues relating to the rights of victims to be addressed.²⁴ However where this is done it should be on the basis of a substantial and compelling argument relating to the issue at stake rather than in relation to a general intention to improve the lot of victims.

Policy makers who are concerned both with victims and with the effectiveness of the criminal justice process, but who are also concerned to develop practical and implementable policies, therefore need to address themselves to the issue of what are realistic and achievable goals. In the context of a developing country such as South Africa this inevitably implies setting priorities and balancing the most urgent victim needs against the most urgent witness needs if relevant priorities are to be set.

At the end of the day however attempts to address victims and witnesses may have a wide range of differing needs which may vary substantially from one case to another. What will be most useful in the end will be to have police and prosecutors who are motivated, empowered and supported, to identify and address the most important needs of the large number of victims and witnesses who are their clients.

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- (a) their person or home searched;
 - (b) their property searched;
 - (c) their possessions seized"

Section 25(1) which provides that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

Section 28(d) which provides, inter alia, that "every child has the right – to be protected from maltreatment, neglect, abuse or degradation.

²⁴ One example of this kind relates to the question of the compulsory testing of rape suspects for HIV. According to the South African Law Commission discussion paper on the issue [I]n these circumstances there is a compelling argument for curtailing an arrested suspect's right of privacy and bodily integrity to a limited extent to enable his accuser to know whether he has HIV. The benefit to alleged victims of the knowledge is not only immediately practical in that it enables them to make life decisions and choices for themselves and people around them; it is also profoundly beneficial to their psychological state to have even a limited degree of certainty regarding their exposure to a life threatening disease. (South African Law Commission, 1999, p. vi).

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